NSW GOVERNMENT Family & Community Services

Policy Directive for Management of Legal Matters

Summary: This policy provides instructions on how FACS Divisions and staff are to manage legal matters.

Document approval

The Policy Directive for Management of Legal Matters has been endorsed and approved by:

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Michael Coutts-Trotter

Secretary

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Purpose of policy

1.1 Summary

As part of our commitment to building an agile and cohesive Department that leads and delivers social reform, this Policy Directive provides instructions on how Family and Community Services (FACS) Divisions and staff are to manage legal matters. The objective of the Policy Directive is to promote:

- compliance with NSW Government policies concerning the management of legal matters;
- collaboration throughout the Department (and where appropriate across the State government) and the consolidation of more efficient and effective legal services across FACS;
- legal advice being responsive to the needs of the Districts;
- the development and sharing of precedents and guidelines to ensure consistency in decision making regarding the commencement, defence or settlement of legal proceedings;
- appropriate and consistent responses to civil litigation which acknowledge issues sensitively and provide information about services and supports available;
- understanding that litigation can be a traumatic experience and that FACS should treat people fairly and ethically and generally facilitate negotiations to reach an early settlement where it is quick, just and in the public interest to do so;
- a systemic approach which ensures that our Department and people are suitably legally represented and that the Government is advised of matters involving substantial costs, risk or state-wide significance;
- a risk management approach which escalates and reports matters which may individually or collectively have a significant impact on our ability to achieve our objectives; and
- the establishment of optimum internal processes that drive continuous improvement in the management of legal matters and the development of our legal expertise and people.

1.2 Purpose

FACS has an obligation under various NSW Government policies, relevant laws and professional and ethical standards to manage legal issues in an efficient, effective, professional and ethical manner.[1]

The Secretary takes these obligations very seriously, and to ensure that they are fulfilled, he has directed that a Best Practice Legal Management Framework (the Framework) be implemented for the management of legal matters within the Department's administration. The Framework comprises four elements:

1. Policy;
2. People;
3. Systems; and
4. Victim support and referrals.

This Policy Directive forms part of the policy component and is intended to provide staff, including legal practitioners, with guidance and support to help them discharge these obligations and ensure that the State's interests are protected and that the Department manages its legal matters appropriately.

This Policy Directive will be complimented by training and development for staff and systems to support the efficient and effective management of legal matters.

The Framework and Policy Directive are designed to ensure that operational areas are provided with optimal legal advice and support to fulfil their operational functions in accordance with approved delegations of authority and best practice governance arrangements.

The Policy Directive is designed to ensure that there is an appropriate balance between District and centralised decision making which ensures that Districts have autonomy to make operational decisions, and that significant or contentious legal issues are referred to the General Counsel and/or Secretary for instructions where appropriate.

The Policy Directive and systems should be considered within the context of, and complement, other FACS policies and systems including the corporate governance and assurance framework and the strategic procurement framework.

As a general rule, if staff are unclear whether a matter is a legal matter or contentious issue which is subject to this Policy Directive, they should consult their manager or their manager's manager.

2 Responsibility for Implementation

Divisional heads are responsible for ensuring that all staff comply with this Policy Directive.

[1] See *NSW Solicitors Manual* (formerly *Riley Solicitors Manual*) which can be accessed on LexisNexis.

3 Definitions

Below is a list terms, keywords and/or abbreviations used throughout this document.

“Contentious issue” includes matters that have been or may be referred to in Parliament; that have or may potentially be of media interest; that involve child deaths, coronial, criminal and secure care matters; that are subject to investigation by the Ombudsman; or that may be referred to a Minister or the Secretary.

“General Counsel” upon the appointment the General Counsel they will be responsible for the management of all Departmental legal matters and the supervision of all Department legal officers. The General Counsel will be supported by Practice Area Leaders responsible for General Litigation, Child Protection, Legislative Review, Privacy, Information and Compliance, Practice Management, and Commercial and Property. As an interim measure ‘General Counsel’ should be construed as the Director of Law and Justice, the Director of Child Protection Legal Services or the Director of Housing Legal Services.

“Significant Legal Matters” include issues which:

- are fundamental to the responsibilities of a FACS portfolio Minister, the Secretary of FACS or any other officer (e.g. power of the Department to initiate child protection proceedings);
- involve important legal, ethical, policy, political, industrial, work health and safety or other operational issues (e.g. legal matters with the potential to establish a detrimental precedent for the Department or allegations that the Department has not conducted legal proceedings fairly);
- involve Coronial inquests and criminal proceedings involving the FACS administration or in which FACS has an interest;
- involve criminal proceedings against someone who is, or was at the relevant time, a FACS employee or complaints of a serious nature which are being investigated by the FACS Professional Conduct, Ethics and Performance Unit (PCEP) under the FACS Abuse and Neglect Policy;
- concern legal proceedings that are likely to interpret policy or legislation of a non-routine nature for which the Secretary is accountable or areas of law that are fundamental to the operations of the FACS portfolio (e.g. whether the Department’s enforcement action against a provider is appropriate or the conduct of a funded Non Government Organisations);
- concern legal proceedings involving more than one FACS Division or multiple NSW Government agencies (e.g. class action against the NSW Government);
- raise issues concerning intergovernmental relations, arrangements or agreements (e.g. interpretation of National Disability Insuarnce Scheme agreement);
- involve care and protection proceedings and instructions from the Australian Government concerning international child abduction of a non-routine nature;

- otherwise concern legal engagement involving the expenditure or reasonably anticipated expenditure on legal costs and disbursements in excess of $100,000; and

- require notification to the Attorney General in accordance with Premier's Memorandum 95-39. For example:

    - have implications for Government beyond the FACS portfolio (e.g. right of Attorney General to intervene in legal proceedings);

    - involve the constitutional powers and privileges of the State and/or the Commonwealth (e.g. power of the NSW Parliament to legislate);

    - raise issues which are fundamental to the responsibilities of Government (e.g. power of NSW Government to levy taxes);

    - involve inter-Governmental or intra-Government issues or disputes (e.g. prosecution of the Department by another agency);

    - arise from, or relate to, matters falling within the Attorney General's areas of responsibility (e.g. conduct of a Magistrate);

- have legal, political or policy implications for more than one NSW Government authority including:

    - claims where effective conduct of the claim requires a significant level of coordination or cooperation between different multiple Government authorities; or

    - claims where one Government authority's approach may adversely affect another Government authority or contradict a position taken by the State of New South Wales in another claim.

- involve a large number of claimants and volume of evidence to be gathered;

- legal advice on employment related matters including litigation concerning workers' compensation, workplace safety and industrial disputes of a non-routine nature;

- involve claimants whose identity may raise sensitive legal, political or policy issues or place claimants at personal or legal risk; and

- may attract community or media attention.

"Legal proceedings" means proceedings commenced before any court, tribunal, commission or other arbitral, adjudicative or quasi-judicial body and including any alternate dispute resolution.

"**NSW FACS Division**" means Strategic Reform and Policy; Programs and Service Design, Southern, Northern and Western Clusters; Ageing, Disability and Home Care; Corporate Services, Aboriginal Housing Office, Land and Housing Corporation and any other entity under the direction or control of a FACS portfolio Minister or the Secretary of FACS.

"**Panel Firm**" means a legal service provider on the TMF Panel, Transport for NSW Panel or a Panel appointed by General Counsel.

"Prosecutions and enforcement" includes the range of administrative, civil and criminal enforcement remedies available to the Department under NSW legislation.

4 Notification and Triage of Legal Matters

This Policy Directive has two objectives. First, all legal matters must be notified to legal services for legal advice and support. Second, all significant or contentious legal matters must be escalated to the General Counsel and/or Secretary for consideration.

The Policy Directive is designed to ensure that there is an appropriate balance between District and centralised decision making which ensures that Districts have autonomy to make operational decisions, and that significant or contentious legal issues are referred to the General Counsel and/or Secretary for instructions where appropriate.

For example, in situations where a child or young person is at risk of serious harm, legal officers in the Care Litigation Team need to be able to make urgent applications, under approved delegations of authority, to the Children's Court for an emergency care and protection order.

Legal officers in the Care Litigation and Care Legal Support Teams will therefore have authority to make urgent applications where instructed to do so. If the matter involves a significant legal matter or contentious issue legal officers must identify the matter as contentious in the open practice management system. This will enable regular reports to be submitted to the Department's Executive.

As a general rule, if a matter potentially involves a significant legal matter or a contentious issue, legal officers must consult their manager or manager's manager in order to determine if the matter should be escalated outside the regular reporting process.

Upon the appointment of the General Counsel they will be responsible for the management of all Departmental legal matters and the supervision of all Department legal officers.

As an interim measure as soon as practicable after a FACS Division becomes aware of a legal matter it must be notified to the relevant legal services team using existing protocols:

- Law and Justice Directorate;
- Child Protection Legal Services; and
- Housing Legal Services.

Directors of legal services teams will be responsible for escalating matters where appropriate.

5 Case Management Plans

Upon receipt of a legal matter the relevant legal practice area will prepare a case management plan using a Case Management System approved by General Counsel.

A case management plan sets out the details and status of a legal matter, including the litigation strategy, milestones and the responsible delegated decision maker (i.e. who is responsible for providing instructions and making decisions regarding the commencement of legal proceedings and the defence or settlement of a matter).

The plan should include all critical information including a summary of the key legal issues, risks[2], the precedential FACS view, policy implications and/or decisions which need to be made, the significance of the matter, dispute resolution options, and the anticipated ongoing costs of the matter.

If the matter involves a significant legal matter or contentious issue the contentious matters field in the open practice management system should be selected. This will enable regular reports to be submitted to Practice Area Leaders, the General Counsel and the FACS Executive. As a general rule, if staff are unclear whether a matter involves a significant legal matter or a contentious issue, they should consult their manager or manager's manager.

The question of intervention by the State in any particular matter, whether a matter should be referred to Crown Solicitor's Office, or whether the Department will provide legal assistance in the form of either direct legal advice or representation, will be considered and determined on a case by case basis, in discussion with the FACS Division and other government agencies (as relevant).

FACS Divisions should not act in a way that pre-empts Government decisions in respect of the appropriate conduct of legal matters or commit funds to legal costs where legal costs would otherwise be met as part of the "core legal work" of Government.

6 Engaging Providers on Legal Services Panels

FACS has access to NSW Government Legal Services Panels including:

- TMF Legal Services Panel which undertakes work covered by TMF Statement of Cover. This must be used for these matters unless TMF approves an alternative provider;
- Transport for NSW Panel which covers a range of legal services. The General Counsel's approval is required before a panel firm is instructed; and
- Community Services Panel which appear for the Minister and Secretary in proceedings before the Children's Court, NSW Civil and Administrative Tribunal

[2] Risks should be assessed using the FACS wide risk and control rating criteria which determines a residual risk score taking into account the risk, consequence and mitigating activities in place: *Risk Management Framework and Policy* March 2014.

and conduct file audits and undertake legal services in relation to victims services for children and young people in out of home care.

The Panels have been established following a competitive tender process including the negotiation of competitive rates.

The Transport for NSW Panel contains a range of sub-panels including commercial law; construction law; planning, property and environment law; work health and safety law; regulation and compliance law; dispute resolution, inquiries and administrative law.

The benefits of Panels include:

- high quality, value for money legal services in a range of specialist areas;
- permitting FACS to instruct firms from the panel without being required to undertake any further procurement process; and
- providing a number of additional benefits for FACS Divisions, including access to workshops and presentations on topical legal issues relevant to FACS staff.

The decision to outsource a significant legal matter for external legal advice should be based on considerations including whether:

- legal advice already exists on the matter within the FACS portfolio;
- there is sufficient expertise and experience within the in-house team to provide the legal services within the requirements of the NSW *Legal Profession Act 2004* and the *Professional Conduct and Practice (Solicitor's) Rules 2013*;
- the in-house team can provide the legal advice within the timeframe required;
- the likelihood of litigation being taken against FACS;
- the assessment of the level of legal and financial risk associated with the matter;
- the strategic importance of the matter; and
- it involves core legal work including constitutional or other whole-of-government issues which should be referred to Crown Solicitor's Office.

If a Division intends to request legal advice other than from in-house lawyers in relation to legislation administered by another department or an issue that has significant implications for the responsibilities or functions of another department, the requesting Division should consult with the other department on the proposal to seek legal advice. Ideally the other department should be given an opportunity to comment on the draft advice before it is finalised.[3]

In certain circumstances Divisions can, with prior approval of General Counsel, purchase legal services from a supplier who is not on a Panel. Divisions must be able

[3] Based on New Zealand *Cabinet Directions for the Conduct of Crown Legal Business 2012*.

to demonstrate that there is no suitable, available or reasonably priced provider on the Panel. Reasons can include:

- there is a conflict of interest for Panel providers in the required area of law, and no other Panel provider operating in another area of law can provide the Services;
- the Services are in an unusual specialist area and no Panel provider has the requisite depth of experience in that specialised area; and
- services can be procured off Panel more cost effectively.

There are various pricing options available under the Panel contracts. The general rule is that providers are required to submit a quote or budget estimate for any matter.

Providers are expected to have sufficient experience in pricing and delivering their services to be able to estimate the price of their services in the same way other service providers can such as doctors, dentists, architects, engineers and accountants. Pricing options are outlined in **Annexure A**.

Overall management of the Transport Panel remains with Transport for NSW, and as a consequence Transport for NSW will, in its role as panel manager, receive high level monthly reports directly from the panel firms on current FACS matters.

As part of the development of the case management plan between Divisions and the General Counsel agreement will need to be reached concerning who is responsible for paying Panel Firms' fees (except for Treasury Managed Fund matters) in accordance with the approved rates under the Panel arrangements.

The Transport for NSW procedures document should be consulted for more detailed information on the sub-panels, the types of matters covered by the panels and the requirements regarding the engagement process.

Treasury Managed Fund (TMF) Legal Services Panels
The TMF is a self-insurance scheme provided by the NSW Government and is administered by SICorp. TMF provides protection for all asset and liability exposures (except Compulsory Third Party) to NSW Government agencies.[4] This includes:

- Workers Compensation;
- Liability;
- Property;
- Motor Vehicle; and
- Miscellaneous losses.

TMF provides indemnity for liability claims against FACS Divisions under the Statement of Cover. TMF cover can be extended to an employee of FACS where

[4] These arrangements do not apply to the Land and Housing Corporation or the Home Care Service which sources their insurance through the private underwriting market.

TMF is satisfied that the employee acted reasonably in the circumstances and within the scope of his or her employment. TMF also provides cover for voluntary workers for death or bodily injury sustained whilst the voluntary worker is actively engaged in voluntary work with FACS.

Where TMF accepts a claim, legal costs will also be met by the Fund. The Fund may also cover legal costs in some coronial matters, but only where it is determined that the coronial inquest is likely to give rise to a legal claim.

The overwhelming majority of claims made against FACS entities through TMF involve alleged breaches of duty of care, and these will generally be managed by legal providers from the General Claims Sub-Panel or Workers Compensation Sub-Panel.

TMF has consolidated its legal panel for matters covered by the Fund. The TMF Legal Services Panel now operates as one panel with five areas of practice or sub-panels; general claims, complex claims, workers compensation, employment and protective actions.

Where a claim is made to TMF and is covered by a sub-panel, a TMF panel firm is to be used. Matters are allocated on a rota system, unless TMF provides approval of the use of a specific firm. For more information regarding utilising the TMF Legal Services Panel for worker's compensation matters contact the FACS Technical Claims Manager in the Workplace, Safety and Wellbeing Unit, Strategic Human Resources, on (02) 8879 9109 or WorkforceSafety&Wellbeing@facs.nsw.gov.au

7 Contracts

It is important that FACS enters into written contracts with third parties in accordance with approved procurement processes and the FACS delegations. The Asset Management and Procurement Directorate (AMP) of FACS provides advice and support in relation to the engagement of third parties for the purchase of good and services. Approved procurement processes for purchasing good and services include prequalification schemes, FACS standard agreements and purchase orders for low value goods and services.

These arrangements are governed by their separate standard contracts and terms and conditions. Depending on the nature of the engagement, a standard contract for that process must be used for the purchase of all good and/or services.

AMP and General Counsel have developed a number of FACS standard agreements including but not limited to the FACS Standard Contract and Letters of Engagement etc.

The FACS Standard Contract must be used where the engagement is outside a prequalified scheme, or for an existing standard offer arrangement or low value purchase order, unless there is prior agreement of General Counsel in relation to the particular contract or a class of contract (e.g. research agreements).

AMP should be contacted in the first instance regarding pre-contract negotiation. AMP will consult the General Counsel's Office (Commercial and Property Practice Area) regarding variations to key terms and conditions and the development and execution of contracts.

To ensure that FACS meets its contractual obligations all contracts must be entered into a contracts register which allocates performance and monitoring responsibilities to relevant business units.

8 Alternative Dispute Resolution

Litigation can be expensive, time consuming and may exacerbate issues. Our key principle is to work collaboratively with all people to resolve disputes sensitively, efficiently and effectively by:

- avoiding disputes where possible;
- resolving disputes in the simplest and most cost-effective manner, taking into account the merits, risks, cost effectiveness and the net public benefit;
- dealing with matters in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party;
- resolving disputes as early as possible;
- clarifying disputes by listening to people's views and considering all resolution options;
- managing disputes in a courteous and fair manner; and
- facilitating a just, quick and inexpensive resolution of real issues.[5]

Most civil disputes can be resolved and the majority of cases which come before the courts are settled before trial. Many disputes are resolved before proceedings are even issued. Resolution of a dispute by agreement can save legal costs, and settlement also allows the parties to focus on moving forward.

The NSW *Civil Procedure Act 2005* and court rules provide the legal framework for litigation. They also oblige the courts, and place lawyers under a duty, to encourage the appropriate use of alternative dispute resolution (ADR) and make it easy to use. Similar provisions can be found in the *Children and Young Persons (Care and Protection) Act 1998* in relation to a common form of litigation within FACS relating to the care jurisdiction. Parties are actively encouraged to consider resolving disputes and there are cost sanctions against those who do not participate in the process without good reason.

[5]Section 56 of the NSW *Civil Procedure Act 2005* provides that the overriding purpose of the Act is to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'. Part VB of the Commonwealth *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* deals with case management in civil proceedings and provides that the 'overarching purpose' of the civil practice and procedure provisions is to facilitate the just resolution of disputes (a) according to law; and (b) as quickly, inexpensively and efficiently as possible. The 'overarching purpose' includes the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

A decision to settle requires balancing the obligation to protect the State's interests with the obligation to act with complete propriety, fairly and in accordance with the highest professional standards when handling claims.

ADR is an integral part of dispute resolution. It is a generic term that describes a number of techniques that can be used to promote early and cost-effective settlement of a dispute. Most of these rely on the imposition of a decision on the parties, through arbitration, expert determination or otherwise. Mediation is different - the outcome is consensual.

FACS recognises and supports the use of ADR as a cost-effective, informal, consensual and speedy means of resolving disputes. We aim to resolve disputes as early as practicable.

Mediation should always be considered as early as possible, but especially when:

- this will best serve the safety, welfare and wellbeing of children and young people;
- the cost of the litigation will be disproportionate to the claim;
- the parties are deadlocked in settlement negotiations;
- the complexities of law, fact or the relationship between the parties are likely to draw out proceedings; and
- the parties wish to settle their dispute in private.

Mediation is probably not suitable when:

- there is an important point of law in dispute which should be tested by the courts, or a commercial or legal precedent needs to be set;
- summary judgement is available quickly and efficiently;
- the parties require emergency injunctive or protected relief however, in these cases the underlying issues could be mediated later;
- settlement discussions are already underway and making progress; and
- the attitude of one of the parties is such that a mediation has no realistic prospect of success.

9 Settlement of Legal Disputes

A settlement involves an agreement or arrangement between parties to finalise their matters in dispute in situations where it is in the best interests of the State to do so.

Settling disputed matters where appropriate is consistent with good management, overall fairness and best use of FACS and other State resources. This has become known as 'the good management rule', which has been endorsed by the courts.[6]

This Policy Directive (including **Appendix C** which provides guidance on the Model Litigant Policy) provides guidelines on the settlement of disputes and the circumstances in which settlement could be considered and the processes which should be followed.

The policy is accordingly designed to ensure that:

- settlement of disputes occurs only in appropriate cases and in accordance with established practices that provide the necessary checks and balances; and
- there is transparency and accountability in the settlement process.

The policy provides guidance on the legal basis for making settlements in disputes and whether a settlement is appropriate in view of factors such as:

- the likelihood of inconsistent treatment;
- the likelihood of creating an undesirable precedent;
- the likelihood or desirability of litigation;
- the possible effect on compliance or enforcement;
- the ability of people to fund proceedings and outcomes including costs;
- the impact of protracted legal proceedings on vulnerable people or victims;
- the availability of alternative methods of dispute resolution; and
- any other special circumstances.

The policy is directed at circumstances where a decision is taken to settle a disputed liability or entitlement in cases where, having regard to a range of factors, it is in the interests of the State or the public interest to do so. In formulating the 'good management rule', the courts have recognised that it is open to Departmental Secretaries to make sensible decisions having regard to the best use of the limited resources available.[7]

Circumstances where it would be generally inappropriate to settle include where:

- the outcome of the settlement would be contrary to an articulated policy reflected in the law;

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[6] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

[7] It is noted that section 41 of the NSW *Civil Liability Act 2002* provides that in determining whether a public authority has a duty of care or has breached a duty of care, consideration should be given to the fact that the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions.

- the outcome is inconsistent with the safety, welfare and well-being of a child or young person;

- the matter is clear-cut or there is a clearly established and articulated precedent on the issue, and there are no special circumstances;

- the settlement would involve inconsistency of treatment for people in comparable circumstances;

- it is in the public interest to have judicial clarification of the issue and the case is suitable for this purpose;

- litigation of the matter through the courts could have a significant flow-on compliance or enforcement effect and the case is suitable for this purpose;

- a similar matter is being litigated and awaiting outcome; and

- the litigant's case is poor and unlikely to be pursued through the NSW Civil and Administrative Tribunal (NCAT) or court. Care is necessary to ensure the settlement practice does not encourage frivolous objections and appeals.

As a general rule, settlement may be an appropriate way to resolve a matter if:

- the cost of litigating (including internal Departmental costs) is disproportionate to the possible benefits, having regard to the prospects of success and likely award of costs (assessed as objectively as possible);

- there are complex factual or quantum issues in contention, or evidentiary difficulties, or there is genuine uncertainty as to the proper application of the law to the facts, sufficient to make the case problematic in outcome or unsuitable for resolution through the NCAT or courts (e.g., where the issue is peculiar to the particular litigant, and the opposing positions are each considered reasonably arguable);

- the settlement will achieve compliance for current and future years in a cost-effective way; and

- unique or special features exist which make it unsuitable for resolution through litigation, e.g. a dispute about the valuation of a unique asset.

Clause 3.4 of the Model Litigant Policy contemplates that a Chief Executive Officer may issue guidelines relating to the interpretation and implementation of the policy. This Policy Directive therefore includes the guidelines in **Appendix C** which are designed to ensure that:

- the model litigant policy should be observed in conjunction with the provisions of the NSW *Civil Procedure Act 2005* which provides that the overriding purpose of the Act and court rules is to facilitate the just, quick and inexpensive resolution of the real issues in the civil proceedings;

- where appropriate, FACS should not argue limitation periods or other technical defences and should settle matters where it would be quick, just and inexpensive to do so; and

- each matter is assessed on a case by case basis using steps including information gathering and early assessment of liability to ensure compliance with the Model Litigant Policy.

    - During proceedings any rules or principles of the relevant court or tribunal should be followed.

10 Prosecutions and Enforcement[8]

The Department has a range of administrative, civil and criminal enforcement remedies available under NSW legislation. To make the best use of our resources, and to maximise the public benefit, our prosecution and compliance activities take into account of the level of risk and consequence of matters and the specific circumstances of each case.

Prosecutions and compliance actions must be conducted in accordance with:

- delegations of authority by legal officers reporting to, or engaged by, the General Counsel;

- instructions provided by the Districts or relevant Division (subject to escalation of significant or contentious matters); and

- the Model Litigant Policy and this Policy Directive.

Fairness:

In conducting administrative, civil and criminal enforcement actions the Department must act impartially and fairly according to law.[9] This will involve informing parties and the court of directions, warnings or authorities which may be appropriate in the circumstances of the case, even where to the detriment of the Department.

As a general rule the Department must offer all its proofs during the presentation of its case and, for example, should not adduce new evidence, relevant to a fact in issue, during cross-examination of an accused person;

As indicated in part 4 of this Policy Directive, in situations where a child or young person is at risk of serious harm, legal officers in the Care Litigation Team need to be able to make urgent applications for child protection orders, under approved delegations of authority.

Decision to Prosecute or Commence Enforcement Action:

The principal test of whether a prosecution or enforcement remedy should be conducted is whether it appears that the offence or wrongdoing, or the circumstances of its commission, is or are of such a nature that a prosecution or enforcement remedy is required in the public interest.

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[8] Based on NSW of the Director of Prosecution, *ODPP Guidelines*, 1 June 2007, and FACS Child Protection Legal Services *Prosecutions Guidelines*, 28 November 2013. The Department will develop a prosecutions and enforcement matrix/pyramid which will supplement this Policy Directive.

[9] See ODPP Guideline 3.

The question whether or not the public interest requires that a matter be prosecuted or subject to enforcement is resolved by determining:

1. whether or not the admissible evidence available is capable of establishing each element of the offence or wrongdoing;

2. whether or not it can be said that there is no reasonable prospect of success in the proceedings;

3. and if not whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

The first matter requires no elaboration: it is the prima facie case test. The second matter requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the case in light of the anticipated course of proceedings, including the circumstances in which they will take place.

The third matter requires consideration of many factors which may include the following:

- the seriousness or, conversely, the triviality of the alleged offence or wrongdoing or that it is of a "technical" nature only;

- the obsolescence or obscurity of the law;

- whether or not the prosecution or enforcement remedy would be perceived as counter-productive e.g., by bringing the law or the Department into disrepute;

- special circumstances that would prevent a fair trial or proceedings from being conducted;

- whether or not the alleged offence or wrongdoing is of considerable general public concern;

- the necessity to maintain public confidence in such basic institutions as the Parliament, the courts and the Administration of the Department;

- the staleness of the alleged offence or wrongdoing;

- the prevalence of the alleged offence or wrongdoing and any need for deterrence, both personal and general;

- the availability and efficacy of any alternatives to prosecution or enforcement action;

- whether or not the alleged offence or wrongdoing is triable only on indictment or other legal proceeding;

- the likely length and expense of a trial or other proceeding;

- whether or not any resulting conviction or remedial measure would necessarily be regarded as unsafe and unsatisfactory;

- the likely outcome in the event of a finding of guilt, having regard to the sentencing options available to the court or other tribunal;

- whether or not the proceedings or the consequences of any resulting conviction or outcome would be unduly harsh or oppressive;

- the degree of culpability of the alleged offender in connection with the offence or wrongdoing;

- any mitigating or aggravating circumstances;

- the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender or wrongdoer, a witness or a victim;

- the alleged offender's or wrongdoer's antecedents and background, including culture and language ability;

- whether or not the alleged offender or wrongdoer is willing to co-operate in the investigation or prosecution or enforcement action against others, or the extent to which the alleged offender or wrongdoer has done so;

- the attitude of a victim or in some cases a material witness to a prosecution;

- whether or not and in what circumstances it is likely that a confiscation order will be made against the offender's or wrongdoer's property;

- any entitlement or liability of a victim or other person or body to criminal compensation, reparation or forfeiture if prosecution or enforcement action is taken; and/or

- the level and extent of the risk for the health, safety and wellbeing of children, young or vulnerable people.

The applicability of and weight to be given to these and other factors will vary widely and depend on the particular circumstances of each case.

A decision whether or not to proceed must not be influenced by:

- the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or wrongdoer or any other person involved (unless they have special significance to the commission of the particular offence or wrongdoing or should otherwise be taken into account objectively);

- personal feelings of the legal officer running the matter concerning the offence or wrongdoing, the alleged offender or wrongdoer or a victim;

- possible political advantage or disadvantage to the government or any political party, group or individual;

- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or running of the matter or otherwise involved in its conduct; or

- possible media or community reaction to the decision.

It is recognised that the resources available for prosecuting or enforcement are finite and should not be expended pursuing inappropriate cases. Alternatives to prosecution or enforcement action should always be considered.

Expedition and Settling charges or other enforcement remedies:

The Department has a fundamental obligation to assist in the timely and efficient administration of the justice system and expedite matters by preparing cases for hearing as quickly as possible.[10]

Similarly, charges or other enforcement remedies are to be selected that adequately and appropriately address the seriousness of the alleged offence or wrongdoing and enable the matter to be dealt with fairly and expeditiously according to law.[11]

11 Delegations

Legislation requires that certain tasks and functions are undertaken by the Department's portfolio Ministers or the Secretary. Ministers and the Secretary have delegated some of these responsibilities to specific officers in FACS. FACS Delegations standardise who can perform particular functions across the Department.

The FACS Delegations schedules list all delegated functions, powers and responsibilities performed by officers within FACS. All FACS Divisions and staff must act in accordance with approved delegations when deciding to commence, defend or settle significant legal matters.

12 Applicable Whole Government Policies

The following NSW Government policies relating to management of legal matters must be complied with by FACS because they are designed to protect the State's interests and ensure that FACS deals with legal matters in accordance with relevant laws, professional standards and ethics:

- Litigation between Government authorities – Premier's Memorandum 97-26;

- Briefing Senior Counsel – Premier's Memorandum 09-17;

- Equitable Briefing Policy;

- Core Constitutional & Whole-of-Government Legal Work by the Crown Solicitor – Premier's Memorandum 95-39; and

[10] See ODPP Guideline 5.
[11] See ODPP Guideline 6.

- Provision of Ex Gratia Legal Assistance – Premier's Memorandum 99-11;
- Mandatory Use of the Treasury Managed Fund (TMF) for All Government Insurance Arrangements – Treasury Circular 2012/12;
- Ex gratia Payments - Treasury Circular 2011/02; and
- The Model Litigant Policy.

A summary of these policies is included in **Annexure A**.

13 Legal Advice and Legal Professional Privilege

As a general rule[12] Departmental legal advice and Cabinet papers should be treated confidentially and protected from disclosure in legal proceedings.

Legal professional privilege safeguards confidential communications between FACS lawyers and internal clients and should be protected unless waived by the client (the Secretary or the Minister).

It is therefore important that legal professional privilege in legal advice provided to the Government is appropriately maintained, and not inadvertently waived.

A document does not automatically attract solicitor/client privilege merely because a lawyer prepared it or it is labelled "legally privileged". Only those parts of a document that record legal advice (as opposed to other types of advice, such as policy advice) will attract solicitor/client privilege. To ensure that legal advice provided to the Government is properly protected by solicitor/client privilege, all those involved in preparing documents containing legal advice should follow these guidelines.

Legal advice should be clearly separated from policy advice, even if the two kinds of advice are provided in one document. Departmental lawyers are encouraged to consider carefully the role they are performing (that is, whether they are providing legal or policy advice, or both), and the way in which their advice is given and will be used.

Depending on its nature and extent, the legal advice should be either:

- contained in a separate section, and described in a way that makes it plain that it is legal advice from the Crown's lawyers (e.g."The Crown Solicitor's Office advises that ..." or "Counsel from FACS advises that..."); or
- attached as an appendix in the form of an opinion from a legal adviser (for example, Crown Solicitor, Solicitor-General, or in-house counsel from the Department).

Documents should also clearly show that the legal advice is sensitive by including a security classification such as "Legally Sensitive" or "Sensitive NSW Cabinet". When

[12] It is noted that section 21 of the NSW *Ombudsman Act 1974* places limits on secrecy and legal privilege claims and that the Ombudsman can obtain access to legally privileged documents.

determining whether to release legal advice that has been provided to the government, or to refer to the content of that advice, and waive (or potentially waive) legal privilege, there is a need to:

- ensure a coordinated government approach to release;
- avoid any adverse impact of a release on current or potential legal proceedings;
- ensure that no single release will create an undesirable precedent; and
- ensure that the privilege is not claimed where this would be unreasonable or contrary to public interest

14 Review

This policy will be reviewed every two years and at other times if any significant new Government policy or organisational review warrants change.

15 Support and Advice

Advice or support in relation to this policy is available from the:

- Person's manager or next most senior manager
- Director's of Legal Services
- General Counsel

Extra information and assistance is available from:

- Asset Management and Procurement
- Governance and Performance

ANNEXURE A

- TMF Legal Panels currently only charge hourly rates. NSW Transport rates include:

- *Fixed price or capped fee*: A fixed price lump sum or maximum capped fee is agreed prior to any service delivery. This method is commonly used when the scope of work is reasonably understood by both parties. The advantage of fixed fee billing is that it you know how much the legal services will cost, or in the case of capped fees, the maximum you will pay. This provides certainty for budgeting purposes and to make it easier to compare quotes from different Providers.

- *Value billing*: Similar to a fixed price in that a lump sum price is agreed. However, with value billing the fee is based on the agreed value received by the Division after the Service has been delivered. It may be that a fixed fee component is agreed prior to work commencing and an 'at risk' component of the fee is agreed based on the Division's perception of the value of the Service delivered.

- *Hourly rates:* This can be used where there is uncertainty around the scope of work or where it is a short term piece of work. The Provider bills for the number of hours spent in delivering the Services. Unless you agree to a capped total this can present risk as the price is open-ended. It is best used for short pieces of work where the price risk is low and the Division is happy to bear the risk of price increases due to scope uncertainty. It is also sometimes used when the scope of a legal matter cannot be ascertained, until the scope is clearer, or when fixed fees might apply.

- *Blended hourly rates*: Similar to hourly rates, this is where the total hourly rates of individual team members are averaged to establish a single rate for the legal team as a whole. The advantage of agreeing a blended rate is that you pay the same hourly rate, regardless of who delivers the services. This means that should more senior time be required, you do not pay a higher hourly rate for their time.

- *Retainers*: A retainer can be an effective solution where a Division has a fixed budget for legal services and a steady demand for a particular type of service. It provides certainty to both the Division and the Provider, is easy to manage and encourages creativity to achieve the objectives. The Division pays a retainer to a Provider (which is effectively a fixed fee) to deliver legal services for an agreed period of time, say 12 months. All services are provided for that period for the price of the retainer and at no additional cost to the Division.

- The Provider bears the risk if the volume of work is greater than anticipated. For a Division it means that all services are delivered within a known budget. To use this method, previous annual expenditure and a breakdown of work type is a useful basis for forecasting the likely level of work and fees for the anticipated period of the retainer. Once the likely volume is identified both parties need to clearly articulate what is included and how any variations will be managed.

- *Volume based discounts*: For large projects which are unable to be accurately scoped in detail at the outset, but where there is a strong expectation that significant legal services will be required, a Provider may consider a one-off percentage reduction in their hourly rates. Using discounted hourly rates for significant projects enables Providers to be competitive within the panel. It also allows flexibility of scope and resources during the life of the project, while a discounted rate structure delivers quantifiable value and demonstrates the Providers' commitment to a long term relationship with the Division. Implementation of this pricing structure involves meeting with possible Providers to understand the project, its objectives and the desired outcome.

ANNEXURE B

1. Litigation between Government authorities

Premier's Memorandum 97-26 sets out guidelines to be followed for litigation between Government authorities. The Guidelines are based on the general principle that litigation between Government authorities is undesirable and should be avoided whenever possible.

Where litigation does occur, FACS should take steps to consult with the agency against which litigation has been commenced and attempt to reach agreement on as many factual and legal issues as possible, to ensure only matters which need to be resolved by the Court are left in issue. In civil proceedings, alternative dispute resolution procedures should be utilised before resorting to the Court system.

The guidelines set out the process to be followed including:

- For prosecutions by one government authority of another;
- For civil disputes between government authorities; and
- For claims of public interest immunity.

In any situation involving potential litigation between FACS and another NSW Government authority, advice must be sought from General Counsel as soon as possible.

Full text of the memorandum can be found **here (press control and click)**.

2. Briefing Senior Counsel

Premier's Memorandum 09-17 requires all NSW Government Divisions to obtain approval from the Attorney General prior to briefing Senior Counsel, including for representation in proceedings and in advice matters. FACS Divisions are required to submit requests to brief Senior Counsel to the FACS General Counsel who will assist in finalising and submitting the application to the Attorney General. To assist with the process, FACS Divisions should include with the request:

- Name of matter;
- Jurisdiction (ie court);
- Overview of facts;
- Relevant legal arguments; and
- Reasons for briefing Senior Counsel

Full text of the memoranda can be found **here (press control and click)**.

3. Equitable briefing Policy

The NSW Government has adopted an equitable briefing policy for engaging Counsel. The policy requires that in selecting Counsel, all reasonable endeavours should be made to genuinely consider female Counsel in the relevant practice area and regularly monitor and review the engagement of female Counsel.

Full text of the Policy can be found **here (press control and click)**.

4. Ex gratia legal assistance

Premier's Memorandum 99-117 provides guidelines for the provision of ex gratia legal assistance for public officials and Crown employees (including FACS employees). Ex gratia legal assistance is available for certain proceedings such where staff are called to appear before a Special Commission of Inquiry or the Independent Commission Against Corruption, Apprehended Violence matters or when legal proceedings have commenced against a public officer or are known to be imminent. The Policy also covers the procedure for a request for assistance. The assistance that may be provided is discretionary and will not be provided as of right.

Applications for ex gratia legal assistance for FACS employees should be made initially to the Divisional Head who should undertake a thorough investigation into the circumstances giving rise to the proceedings to determine whether it falls within the guidelines and whether an application for ex gratia assistance is supported.

If an application for ex gratia legal assistance is supported by the Divisional Head, a brief together with supporting documentation should be submitted to the Secretary of FACS via the General Counsel. General Counsel will review and submit the application to the Department of Justice for approval. In providing approval, Department of Justice will determine rates and the legal service provider to be engaged. Once the application is approved by Department of Justice, the employee is entitled to be indemnified against legal costs and any verdict (in civil proceedings) awarded against the person (subject to any conditions that may be imposed by Department of Justice).

The indemnity will not cover fines, penalties or criminal compensation, or punitive/exemplary damages where the officer has engaged in serious and wilful misconduct.

Usually, when ex gratia legal assistance is approved, the employee will be represented by the NSW Crown Solicitor's Office and the FACS Division will be responsible for paying the legal costs.

Full text of the memoranda can be found **here** (press control and click).

5. Ex gratia payments

NSW Treasury Circular 2011/02 confirms that only Ministers have the authority to approve ex gratia payments. Ministers can do so as representatives of the Crown and the power cannot be delegated.

Ex gratia payments (also known as act of grace payments) may be made to persons who Ministers consider have suffered a financial or other detriment as a result of the workings of government. The detriment must be of a nature which cannot be remedied through recourse to legal proceedings.

In some instances, applications for ex gratia payments are made in circumstances where legal action has also been commenced or threatened. In such cases, even if the case has no prospect of success, Ministers should consider taking steps to ensure that the Crown is protected from further action. In addition, in appropriate cases, consideration should be given to requiring the recipient of an ex gratia payment to enter into a deed of release agreeing to waive any claim related to the present circumstances or to undertake in writing to set off the ex gratia payment from any claim. In such a deed of release, confidentiality clauses should also be considered.

Ex gratia payments are entirely discretionary in nature and it is for Ministers to determine those cases in which payments will be made having regard to all the circumstances. There are no formal or mandatory criteria for determining when or if such payments should be made and every case should be considered on its own facts and in its own context. However, when a Minister is deciding whether to make an ex gratia payment, a relevant consideration is whether that action would have potentially wider implications for agencies or the Government.

It should be noted that ex gratia payments do not include those which are made:

- to meet legal liabilities; or
- where legal advice is that the Government may be found liable to pay compensation.

For example, payments made to settle court proceedings against the Crown which have a real prospect of success. TMF will provide cover for legal liabilities for its member agencies.

In circumstances where ex gratia payments are being considered and legal proceedings have commenced, FACS should have regard to the Model Litigant Policy which applies to the conduct of civil claims and litigation involving the State.

Ministerial submissions regarding ex gratia payments must be prepared in consultation with the General Counsel and be endorsed by the Secretary.

Full text of the Circular can be found **here** (press control and click).

6. Model Litigant Policy

Full text of the Policy can be found **here** (press control and click).

The Model Litigant Policy creates an obligation on FACS to act as a model litigant. This requires more than merely acting honestly or in accordance with the law and court rules. It requires that FACS acts with complete propriety, fairly and in accordance with the highest professional standards.

The obligation does not prevent FACS from acting firmly and properly to protect the State's interests. It does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made. Under the Model Litigant Policy the courts require Crown litigants to act in the public interest by taking an active but candid role in proceedings. The courts expect the Crown to avoid technicality and technical defences, and pursue fairness in the conduct of proceedings.

People and their representatives should be advised of our model litigant obligations at the commencement of litigation. FACS external legal service providers and counsel representing FACS should also be informed of their model litigant obligations at the time they are engaged to represent FACS.

FACS takes its obligations under NSW Government policies seriously and provides regular training to our legal services officers in the model litigant obligations.

Clause 3.4 of the Model Litigant Policy contemplates that a Chief Executive Officer may issue guidelines relating to the interpretation and implementation of the policy. The Secretary has therefore issued the guidelines in **Appendix C** which are designed to ensure that:

- the Model Litigant Policy should be observed in conjunction with the provisions of the NSW *Civil Procedure Act 2005* which provides that the overriding purpose of the Act and court rules is to facilitate the just, quick and inexpensive resolution of the real issues in the civil proceedings; and

- where appropriate, FACS should not argue limitation periods or other technical defences and should settle matters where it would be quick, just and inexpensive to do so.

Parts 8 and 9 of this Policy Directive and **Appendix C** provide guidance on the application of the Model Litigant Policy and the processes which should be followed.

ANNEXURE C

MODEL LITIGANT GUIDELINES

A. Introduction

1. These Guidelines have been issued by the Secretary.

2. These Guidelines relate to the interpretation and implementation of the Model Litigant Policy (**Policy**).

3. However, each case must be assessed on a case by case basis. These Guidelines are not exhaustive in relation to the steps that may need to be taken by the Department in each case to ensure compliance with the Policy.

4. The Policy and these Guidelines apply to civil claims and civil litigation involving the Department of Family and Community Services (**Department**) including litigation before courts, tribunals, inquiries, arbitration and other alternative dispute resolution processes.

B. The obligation

5. The Department (as an agency of the State) must act as a model litigant in the conduct of litigation.

6. This obligation requires the Department (and its lawyers[13]) to act in a manner which is more than merely honest and in accordance with the law, court rules and ethical obligations. This obligation requires the Department to act with complete propriety, fairly and in accordance with the highest professional standards.

C. What is required to comply with the obligation?

In order to comply with this obligation, legal officers for the Department must do at least the following:

Information Gathering

7. The legal officer with carriage of the matter should promptly gather and consider any relevant information to the proceedings which is available to the Department.

7.1 **When should this information be gathered?** Immediately following the receipt of the originating process or notification of a potential claim.

7.2 **How should this information be gathered?**

7.2.1 All relevant current and historical documents held by the Department (hard copy and electronic) should be located and provided to the legal officer with carriage of the matter.

[13] This includes the Department's in-house lawyers and external lawyers or counsel who are retained to act for the Department.

7.2.2 Any employee of the Department with information which is relevant to the proceedings should be identified and interviewed.

7.2.3 If appropriate, any former employee of the Department with information which is relevant to the proceedings should be identified and interviewed.

7.2.4 If appropriate and cost effective, an investigator should be engaged to identify any further information which may be relevant to the proceedings. Practice Leader approval should be sought before any investigator is retained.

Early assessment of liability and quantum

8. The Department must make an early assessment of the State's prospects of success in legal proceedings and the State's potential liability in claims against the State.

8.1.1 **What should this assessment include?** Where the State is the defendant or potential defendant in proceedings, this should include an assessment of:

a) the State's prospects of successfully defending the matter (including consideration of the possible defences open to the State and the strengths and weaknesses of these defences); and

b) a quantification of its potential financial exposure if the State is unsuccessful in defending the litigation.

8.1.2 **What form should this assessment take?** This assessment should be in the form of a written advice.

8.1.3 **When should this assessment be made?** This assessment must be made:

a) where proceedings are foreshadowed, as soon as the Department has received sufficient particulars of the potential claim to allow the Department to make such an assessment; and

b) where proceedings have been commenced, within 3 months of the Department receiving the originating process and prior to the State filing any defence or making any interlocutory application.

8.1.4 **Who should undertake this assessment?**

a) Where the legal officer with carriage of the matter has sufficient expertise and capacity to undertake this assessment themselves, that solicitor should undertake the assessment.

b) In all other circumstances, the assessment should be undertaken by the external solicitors or counsel who have been engaged to act on behalf of the State. If the assessment

is undertaken by external solicitors or counsel, the legal officer in the Department with carriage of the matter should inform the external solicitors or counsel, that the assessment is required within the time period stipulated in clause b) above.

8.1.5 **What if the assessment cannot be completed within the required time?** If proceedings have been commenced and the Department is unable to complete the required assessment within the time period stipulated in clause b) above, then the legal officer with carriage of the matter must send a memorandum to the General Counsel:

a) outlining why the assessment cannot be undertaken at that time; and

b) requesting Practice Leader grant an extension of time for complying with this requirement. Practice Leader will then set a new date for the completion of the assessment.

8.1.6 **When should this assessment be revisited?** The assessment should be revisited whenever the Department receives any information which could relevantly alter the findings of the original assessment.

Settlement Offers and Mediation

9. Immediately following the conclusion of the assessment identified in clause 8 above, the legal officer with carriage of the matter should undertake the following relevant steps.

9.1 **What if the assessment indicates that the State does not have good prospects of defending the proceedings?**

9.1.1 Prepare a memorandum to the General Counsel:

a) summarising the assessment or attaching a copy of it; and

b) outlining the proposed settlement strategy (including, where relevant, offers of compromise, Calderbank offers, apologies and alternative dispute resolution including mediation).

9.1.2 Following confirmation from the General Counsel that the proposed settlement strategy is appropriate, write to TMF attaching the assessment undertaken in accordance with clause 8 above and request approval regarding the quantum of any potential settlement amount.

9.1.3 Once TMF's approval has been received, immediately correspond with the plaintiff's solicitors to implement the proposed settlement strategy. For example, by:

- making a settlement offer;
- offering an apology; or

- inviting the plaintiff to participate in a mediation or negotiation.

9.2 **What if the assessment indicates that the State has good prospects of defending the proceedings?**

9.2.1 Prepare a memorandum to the General Counsel which considers whether a settlement strategy should be adopted at this time including:

a) whether or not a commercial or economic settlement offer should be made to the plaintiff; and

b) whether the plaintiff should be invited to participate in alternative dispute resolution (including mediation).

Relevant factors in determining whether the above should occur include:

- the potential legal costs that the Department may incur in defending the proceedings including whether the cost of the proceedings will be disproportionate to the claim;
- the risks to the State and the Department associated with the proceedings;
- the financial position of the plaintiff; and
- whether the matter has any precedential value to the Department.

For further guidance on when matters should be mediated or when settlement negotiations should be entered into, please refer to sections 8 and 9 of the "Policy Directive: Management of Legal Matters and Legal Services".

9.2.2 If it is determined that a settlement strategy should be adopted at this time:

a) Write to TMF attaching the memorandum prepared in accordance with clause 9.2.1 above and request approval regarding the quantum of any potential settlement offers.

b) Once TMF's approval has been received, immediately correspond with the plaintiff's solicitors to implement the proposed settlement strategy.

9.3 **What if the decision is made not to adopt a settlement strategy following the completion of the assessment?**

9.3.1 Every 3 months, the legal officer with carriage of the matter should revisit and, if necessary, update the memorandum prepared in accordance with clause 9.2.1 above.

9.3.2 If it is determined that a settlement strategy should be adopted, the steps in clause 9.2.2 should be completed.

Confidentiality Agreements

10. The Department should consider the use of confidentiality clauses in relation to settlements on a case by case basis, taking into consideration:

    a) the claimant's preference; and

    b) whether there is a cross claim or other related proceedings.

10.1 In the event a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim and their experience of the claims process.

Requests for Particulars

11. The legal officer with carriage of the matter must consider whether or not further and better particulars are required.

11.1 **When should this consideration occur?** Immediately following the receipt of the originating process.

11.2 **In what circumstances should further and better particulars be requested?** Further and better particulars should only be requested where such particulars are necessary to the State understanding the claim that it is facing. Such a request should be limited to those particulars which are necessary to enable the State to understand the plaintiff's claim and not be taken by surprise. Lengthy requests should be avoided unless absolutely necessary, particularly where the enquiries in clause 7 above may elicit the relevant information.

11.3 **Who should prepare the request?** The request can be prepared by the external solicitors or counsel who have been engaged to act on the matter. However, prior to instructions being provided to issue the request, the legal officer with carriage of the matter should review the request and consider whether or not the requests are appropriate.

Defences

12. Following the receipt of the assessment undertaken in accordance with clause 8 above, the legal officer with carriage of the matter must carefully consider what defences will be relied upon by the Department.

12.1 **What is a technical defence?** "Technical defence" is not defined in the Policy. However, it is commonly understood to be a defence which is based solely on the fact that the plaintiff has not complied with certain procedural steps (or "technicalities").

12.2 **What defences are not considered technical defences?** Part 5 of the Civil Liability Act 2002 (NSW) which deals with the liability of public and other authorities (which includes the Department) are not considered to be technical defences. Accordingly, if relevant, any defence available to the Department pursuant to Part 5 of the Act should be pleaded.

12.3 **When should technical defences be relied upon?** Technical defences should only be relied upon:

12.3.1 where the interests of the State or the Department would be prejudiced by a failure to comply with a particular requirement; and

12.3.2 there has been compliance with Premier's Memorandum 97-26.

Full text of the memoranda can be found here (press control and click).

12.4 **When should a Limitation Act defence be relied upon?**

12.4.1 If the proceedings relate to allegations of child abuse (including sexual or physical abuse), the Department should not generally seek to rely upon any defence available to it pursuant to the *Limitation Act 1969* (NSW).

12.4.2 If the proceedings relate to allegations of child abuse, FACS can rely on a statutory limitation period as a defence in matters involving multiple defendants, where there is a risk that the State could bear a disproportionate share of the whole liability owed to the plaintiffs.

12.4.3 In all other proceedings, a defence pursuant to the *Limitation Act 1969* (NSW) should only be run where the Department has received formal advice that based on a review of the information available:

a) the Department could not properly defend the matter due to the length of time that has passed; or

b) there is a strong likelihood that an application for extension made by the plaintiff would fail.

Interlocutory applications

13. The Department must carefully consider whether or not any interlocutory applications are required in the proceedings.

13.1 **When should such applications be made?** The Department should only make interlocutory applications where it is absolutely necessary to the proper conduct of the proceedings. The Department must not bring interlocutory applications without a proper purpose to delay proceedings or increase costs pressures on litigants.

13.2 **When should strike out or dismissal application be made?**

13.2.1 Generally speaking, applications can be made to the court that a proceedings be struck out or dismissed where:

a) there is no arguable cause of action and the plaintiff's case is doomed to fail; or

b) the plaintiff's pleadings are not in the form required by the court rules. For example, the allegations contained in the pleadings are so vague or imprecise that Department cannot respond to the allegations.

13.2.2 Where the plaintiff's pleading do not contain an arguable cause of action and are doomed to fail, or are an abuse of process, the Department should seek to dismiss the plaintiff's pleading. If the Department fails to do so, the Department may be embroiled in lengthy litigation over a number of years culminating in potentially lengthy and expensive hearings.

13.2.3 However, where the plaintiff's pleadings are not in the form required by the court rules, careful consideration should be given as to whether or not such an application should be made. In these circumstances, courts are often unwilling to strike out proceedings on a final basis. In most cases, if there is an arguable cause of action and the issues relate to the form of the pleading, the courts will grant a plaintiff leave to amend their claim. Accordingly, where there is an arguable cause of action, the Department should invite the plaintiff to amend their pleadings by consent before considering whether to make an application to the court.

13.3 **What is required before any application is made?**

13.3.1 Prior to any interlocutory application being made, the legal officer with carriage of the matter must prepare (or cause to be prepared) a formal advice which considers:

a) the Department's prospects of success in relation to the application;

b) whether the application has the potential to significantly delay the conduct of the proceedings; and

c) the potential cost implications for the Department as a result of the application.

13.3.2 The advice prepared in accordance with clause 13.3.1 above should be provided to the General Counsel who will approve the filing of the interlocutory application.

14. Should technical points be taken regarding litigation practice and procedure? The Department considers that the obligation to not plead technical defences extends to not taking technical points on matters of litigation practice and procedure. For example, the Department should not make any interlocutory applications based on:

a) the late service of documents where no prejudice has been suffered; and
b) incorrect forms being used by the plaintiffs.

Narrowing of disputes

15. As a general principle, the Department should at all times seek to narrow the issues in dispute by complying with the following steps:

15.1 In all interlocutory and final hearings, the Department must not require the plaintiff to prove a matter which the Department knows to be true.

15.2 If the plaintiff serves a notice to admit facts or authenticity of documents, the Department must not dispute any facts or the authenticity of documents which it knows to be true.

15.3 If the assessment undertaken in accordance with clause 8 above indicates that the State is liable to the plaintiff and settlement attempts have been unsuccessful, the Department must not contest liability. The proceedings should be limited to the issue of the quantum that should be paid to the plaintiff.

15.4 The Department should, wherever possible, attempt to resolve matters by agreement in order to narrow the issues in dispute. For example, if the plaintiff issues a notice to produce which is extremely broad in scope, the State should first seek to narrow the scope of the notice by agreement (prior to considering any application to set aside the notice in whole or in part).

Appeals

16. The Department needs to carefully consider whether or not appeals should be pursued.

16.1 **When should appeals be undertaken and pursued?** Appeals should only be undertaken where:

16.1.1 the Department believes that it has reasonable prospects of success; or

16.1.2 the appeal is otherwise justified in the public interest.

16.2 **What is required prior to an appeal being undertaken?**

16.2.1 The legal officer with carriage of the matter should obtain a formal advice from counsel which considers:

a) the Department's prospects of success in relation to the appeal;

b) whether the appeal is in the public interest; and

c) the potential cost implications for the Department as a result of the appeal.

16.2.2 Prior to any appeal being filed, the legal officer with carriage of the matter must prepare a memorandum to the General Counsel:

a) attaching a copy of the advice obtained pursuant to clause 16.2.1 above; and

b) requesting approval to file the appeal.

16.3 **Can appeals be commenced without the advice specified in clause 16.2 being completed?** Yes. The Policy states that the commencement of an appeal prior to the receipt or consideration of legal advice is permitted if it is necessary to avoid prejudice to the interests of the State or the Department provided that a decision whether to continue the appeal is made as soon as

practicable. However, the commencement of appeals without the advice specified in clause 16.2 should be avoided wherever possible.

16.4 **What do you do if an appeal is commenced without the advice specified in clause 16.2 being completed?** Within 2 weeks of the commencement of the appeal, the legal officer with carriage of the matter must obtain an advice from counsel as to whether the appeal should continue (including advice on the matters identified at clause 16.2).

D. What is not required by the Policy?

17. The Policy expressly states that the obligations do not prevent the Department from acting firmly and properly to protect its interests. Accordingly, the Policy does not prevent all legitimate steps being taken in pursuing litigation or from testing or defending the claims which have been made.

18. The Policy expressly allows the Department to undertake the following steps:

18.1 **Seek, and enforce, costs orders**.

18.1.1 A range of factors should be taken into account in deciding whether to seek or enforce costs. Factors that would support seeking or enforcing costs include:

a) that the other party caused unnecessary expense and delay in the proceedings;

b) that there is an apparent need to deter vexatious litigation in the future;

c) that the debtor is apparently able to pay, and

d) that the anticipated expense in recovering costs does not outweigh the anticipated recoverable costs.

18.1.2 In some cases, especially on compassionate grounds, it may be appropriate to seek a costs order but to defer a decision on enforcing the order (eg where a person's medical, financial or domestic circumstances are difficult). This approach can also be used as a deterrent to future vexatious litigation.

18.1.3 The State is entitled to claim costs for its use of in-house lawyers (Lenthall v Hillson [1933] SASR 31). However, these costs are limited to the portion of the in-house counsel's or solicitor's salary that was expended on the proceedings, in addition to overheads for the costs of maintenance of premises, legal support staff, photocopying and the like.[14]

18.1.4 If the State is seeking costs and the Crown Solicitor has acted for the State, costs should be sought for the Crown Solicitor's time.

[14] *Environment Protection Authority v Taylor Woodrow (Aust) Pty Ltd (No2)* (1997) 97 LGERA 368.

18.1.5 Prior to any action being taken for the recovery of cost, the legal officer with carriage of the matter should consider:

a) whether or not costs orders should be sought including the utility of any such orders and the general appropriateness of seeking such an order; and

b) if sought, whether or not the costs orders should be enforced including the costs of enforcement and the ability of the plaintiff to comply with any such costs order.

18.1.6 Costs orders should not be:

a) sought where there is no utility to such orders; and

b) enforced where the cost to the Department for doing so would exceed any amount it would receive pursuant to the costs order.

18.1.7 Enforcement action should not be taken in any proceedings without the express approval of the General Counsel. Please refer to section 10 of the "Policy Directive: Management of Legal Matters and Legal Services".

18.2 **Relying on claims of privilege including legal professional privilege and public interest immunity.**

18.2.1 When making a claim for privilege the legal officer with carriage of the matter should satisfy themselves that there is a proper basis for making such a claim and, if necessary, obtain advice on this issue.

18.2.2 Where privilege has been clearly waived, the Department must not resist the disclosure of the relevant documents. If a plaintiff asserts that privilege has been waived, if necessary, the legal officer with carriage of the matter should obtain advice on this issue.

18.3 **Pleading limitation periods.**

18.3.1 See the guidance contained in clause 12.4 above.

18.4 **Seeking security for costs.**

18.4.1 Whilst such an application is allowed by the Policy, careful consideration needs to be given as to whether or not such an application is appropriate in all the circumstances. Accordingly, prior to any such application being made, the steps outlined in clause 13.3 must be complied with.

18.5 **Opposing unreasonable or oppressive claims or processes.**

18.5.1 Prior to any such step being taken, the legal officer with carriage of the matter should comply with the relevant guidelines outlined in clauses 13 and 15 above.

18.6 **Requiring opposing litigants to comply with procedural obligations.**

18.6.1 An example of complying with procedural obligations would be the requirement for plaintiffs to provide proper particulars of their claims or to file an affidavit in support on any interlocutory applications made by the plaintiff.

18.6.2 Prior to any such step being taken, the legal officer with carriage of the matter should consider the relevant guidelines outlined in clauses 11, 13 (in particular clause 1) and 15 above.

18.7 **Moving to strike out untenable claims or proceedings.**

18.7.1 Prior to any such step being taken, the legal officer with carriage of the matter should comply with clauses 13.2 and 13.3 of these Guidelines.

E. How does the Policy apply to unrepresented litigants?

19. The Policy itself does not make any distinction between, and applies equally to, represented and unrepresented litigants.

20. However, given the potential power imbalance between the Department and an individual person, the Department must be particularly aware of the fact that it is dealing with an unrepresented litigant who is likely to be unfamiliar with legal processes.

21. The legal officer with carriage of the matter should correspond with the unrepresented litigant in a clear and concise manner which can be understood by the unrepresented litigant. Legalistic and technical phrases should be readily avoided, and where unavoidable, clearly explained.